Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

U.S. Customs Service
T.D. 92–92 and 92–93
General Notices
Proposed Rulemakings
U.S. Court of International Trade
Slip Op. 92–157
Abstracted Decisions:
Classification: C92/161 and C92/162
Announcement of Annual Judicial Conference

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 103

(T.D. 92–92)

RIN 1515–AA94

DISSEMINATION OF MANIFEST DATA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include specific information regarding the availability of manifest data on magnetic tapes for dissemination to the public. The amendment also informs importers or consignees of procedures they may follow to request confidential treatment of such data. This amendment is being made so that information regarding the availability of both this product and confidentiality request procedures will be more readily available to the public.

EFFECTIVE DATE: September 24, 1992.

FOR FURTHER INFORMATION CONTACT: Phyllis Dye, Revenue Branch, National Finance Center (317) 298–1330.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Treasury Decision 88–38, published in the Federal Register on July 1, 1988, (53 FR 25041) as a Notice of a New Information Product Pursuant to OMB Circular A–130, announced that Customs would be making available to the public manifest information. T.D. 88–38 explained how the electronic exchange of data between Customs, carriers and Port Authorities regarding cargo arriving in and moving through ports was an integral element of the ACS, and how this exchange would improve cargo accountability and facilitate terminal operations for all parties involved. Because the automated system which was developed to transmit

this manifest data to port authorities could also create a magnetic tape of all manifest activity nationwide, Customs determined that the data could be made available to the public. T.D. 88–38 was issued with a discussion of the analysis of comments which had been received in response to Customs request for comments on the proposal that this manifest information would be made available. The T.D. also described in detail the procedures whereby Customs would see to it that importers or consignees who requested confidential treatment of their names and addresses and that of their shippers would receive confidentiality. The procedures for requesting confidentiality are presently set forth in the Customs Regulations in § 103.14(d).

As the system is presently conducted, Customs is able to prepare a daily tape which contains all manifest transactions which have been transmitted to Customs through the AMS during the course of the day. The tape will be mailed from the U.S. Customs Data Center the following business day by first class U.S. mail to the party requesting it. If the requester desires another form of delivery, it will be necessary for the requester to make his own arrangements and notify Customs in advance. As stated above, information which Customs had been requested to keep confidential will not appear on the tape which will be offered to the public. The amendment includes a list of the data elements which will be made available to the public and identifies those elements which will be deleted where confidentiality has been requested.

The current production cost of the tapes is $100.00 per day, which is what Customs charges the public for any copies requested. Requests for tapes must be in writing and submitted to the National Finance Center in Indianapolis, along with a check for the amount covering the number of tapes desired. Tapes are available for specific days or on a subscription basis. Bills for subscriptions will be issued monthly with the first month's fee due in advance. Subscriptions may be canceled provided the U.S. Customs Service receives written notice at least 10 days prior to the end of the month. Interested persons may contact Mrs. Phyllis Dye at the National Finance Center on (317) 298–1330 for further details.

If there is a technical problem with the tapes, or for non-receipt of tapes, the subscriber must notify the U.S. Customs Data Center in writing within seven days in order to receive a replacement or credit towards future tape purchases. Refunds will not be provided. Information regarding the technical specifications of the tapes, problem tapes or the non-receipt of tapes may be directed to Mr. Ray Fouch, U.S. Customs Data Center, on (703) 644–5200.

Because Customs believes that the availability of this information should receive the widest possible dissemination, Customs has decided to amend its regulations to include the information concerning the availability of manifest information on tape and the procedures for obtaining the tapes.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because this amendment involves a non-substantive change to the Customs Regulations relating to agency management, and only serves to provide the public with greater access to information about an existing Customs program under which information is released to the public, which was itself developed after following notice and comment procedure, pursuant to § 553(a)(2) of the Administrative Procedure Act (5 U.S.C. 553), no notice of proposed rulemaking or public procedure is necessary. For the same reasons, a delayed effective date is inappropriate.

REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), or any other statute.

EXECUTIVE ORDER 12291

Because this document does not result in a "major rule" as defined by E.O. 12291, the regulatory impact analysis and review prescribed by the Executive Order is not required.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 103

Customs duties and inspection; Imports; Freedom of Information.

AMENDMENT TO THE REGULATIONS

Part 103 Customs Regulations (19 CFR Part 103) is amended as set forth below:

PART 103—AVAILABILITY OF INFORMATION

1. The authority citation for Part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

2. In § 103.14, a new paragraph (e) is added to read as follows:

§ 103.14 Information on vessel manifests and summary statistical reports.

* * * * * * *

(e) *Availability of manifest data on magnetic tapes.*

(1) *Availability.* Manifest data acquired from the Automated Manifest System (AMS) is available to interested members of the public on mag-

netic tape. This data, compiled daily, will contain all manifest transactions made on the nationwide system within the last 24 hour period. Data for which parties have requested confidential treatment in accordance with § 103.14(d) will not be included on the tapes. These tapes may be purchased at the government's production cost. Tapes are available for specific days or on a subscription basis.

(2) *Requests and subscriptions.* Requests for tapes must be in writing and submitted to: U.S. Customs Service, National Finance Center, Revenue Branch, P.O. Box 68907, Indianapolis, Indiana 46278. Requests must include a check to cover the cost of the tapes requested. Actual costs and other specific information should be ascertained by contacting the National Finance Center, Revenue Branch at (317) 298–1330. Bills for subscriptions will be issued monthly, with the first month's fee due in advance. Requested tapes will be mailed from the Customs Data Center, first class, on the next business day after compilation. Parties desiring another form of delivery will have to make their own arrangements and notify Customs in advance. Subscriptions may be canceled provided Customs receives written notice at least 10 days prior to the end of the month. The U.S. Customs Data Center must be notified in writing within seven days of technical problems with tapes or non-receipt of tapes in order to receive a replacement or credit towards future tape purchases. Refunds will not be provided. Information regarding the technical specifications of the tapes, problem tapes or the non-receipt of tapes should be directed to U.S. Customs Data Center, on (703) 644–5200.

(3) *Data elements.* The following are the data elements from the AMS manifest which will be provided to the public via magnetic tape:

1. Carrier code.
2. Vessel country code.
3. Vessel name.
4. Voyage number.
5. District/port of unlading.
6. Estimated arrival date.
7. Bill of lading number.
8. Foreign port of lading.
9. Manifest quantity.
10. Manifest units.
11. Weight.
12. Weight unit.
13. Shipper name.*
14. Shipper address.*
15. Consignee name.*
16. Consignee address.*
17. Notify party name.*
18. Notify party address.*

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*Designates data element which will be deleted where confidentiality has been requested.

19. Piece count.
20. Description of goods.
21. Container number.
22. Seal number.

* * * * * * *

MICHAEL H. LANE,
Commissioner of Customs.

Approved: August 26, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 24, 1992 (57 FR 44089)]

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19 CFR Parts 142 and 178

(T.D. 92–93)

[RIN 1515–AB08]

LINE RELEASE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by providing a new method of processing entries of merchandise entering the U.S. This new method, Line Release, is designed to release and track repetitive shipments through bar code technology. It may be used as a form of entry or immediate delivery at certain locations approved by Customs and will result in expedited release of repetitive shipments.

EFFECTIVE DATE: October 26, 1992.

FOR FURTHER INFORMATION CONTACT: William Nolle, Office of Automated Commercial Systems (202) 927–0541 or Bruce Nunziata, Office of Cargo Enforcement and Facilitation (202) 927–0485.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 28, 1991, a document was published in the Federal Register (56 FR 42568), proposing to amend the Customs Regulations by pro-

viding an automated method to expedite the release of certain shipments. The method, known as Line Release, is designed for the release and tracking of highly repetitive, high volume shipments through the use of personal computers and bar code technology. Line Release will be both faster and require less paperwork than other entry methods.

The proposal generated many comments. An analysis of the comments is set forth below.

DISCUSSION OF COMMENTS

Comment:

The use of Line Release should not be limited to land border ports. The benefits of Line Release should be available wherever Customs and the importing community chooses.

Response:

While at this time, Customs is not planning the expansion of Line Release beyond the land border environment, Customs agrees that the language restricting Line Release to land border ports is unduly restrictive. Accordingly, the language restricting Line Release to land border ports is removed. Customs current policy of restricting Line Release to land border ports, however, will remain in effect until such time as both Customs and the trade community mutually agree to any change in this policy.

Comment:

In proposed § 142.42(b) and (g), relating to application for Line Release, Customs is requesting information related to the initiator and the entry filer, respectively. As the entry filer and the initiator are the same parties, this is redundant.

Response:

Customs disagrees. There may be situations when the initiator and the filer may not be the same party. In addition, other than the name of the company, the information requested is not duplicative in paragraphs (b) and (g) and the information is for two different purposes. The information requested in (b) – the name of the company, contact name and telephone number – is used in case there are any questions on the application. The information requested in (g) – the company name, entry filer code, and importer number – is keyed into the Line Release data base and transmitted to the mainframe. In addition, this arrangement of information facilitates data base maintenance.

Comment:

In § 142.42(h), regarding the application for Line Release, Customs requests product information to be submitted. One of the requested elements of product information is "HTSUS number for particular product or range of HTSUS numbers for multiple products for which Line Release is sought." This language is vague. What does Customs mean by "range of HTSUS numbers"?

Response:

We do not wish to define this term or state specific ranges for Line Release products. Customs believes that it would severely limit system flexibility to define specific ranges and that the needs of the trade community are better served by allowing more flexibility.

Comment:

Proposed § 142.42(h), regarding the information required on an application for Line Release, states that a HTSUS number is required. However, in the background portion of the proposal, it was stated that tariff numbers be reported at the sub-heading level. At what level of specificity must the tariff number be set forth on the Line Release application?

Response:

While the Line Release system is capable of accepting numbers at the four, six or eight digit level, Customs has determined that for greatest flexibility, HTSUS numbers shall be reported at the sub-heading level. Accordingly, the language in § 142.42(h) is changed to reflect this. If District Directors need more detail than the sub-heading level, they may request information at the eight digit level.

Comment:

If an application is denied, Customs should advise the applicant of the criteria used to make the determination and why the application was denied.

Response:

Line Release applications are subjected to risk analysis through the use of selectivity. Information contained in selectivity files is of a sensitive nature. Providing applicants the reasons they were denied the use of Line Release would be tantamount to releasing selectivity criteria to the public. Accordingly, Customs will not advise the applicant of the criteria used or why an application for Line Release is denied.

Comment:

Proposed § 142.47 regarding examinations is unclear about why in some instances a Line Release assigned entry number is voided and in other instances the assigned entry number is retained pending the result of the investigation.

Response:

There are two different kinds of examinations of Line Release merchandise. The procedures that are followed are different for the two examination types. Customs believes that it may be detrimental to Customs enforcement efforts to specify the kinds of examinations or to link certain procedures to a particular type of examination.

Comment:

Customs should advise participants if it is removing a C-4 Code from Line Release.

Response:

Section 142.49(a) provides that a District Director may delete an entry filer's C-4 Code without prior notification in cases of willfulness or when public health, interest, or safety so requires. This is not to say that prior notification will not be made under any circumstances. Under circumstances when Customs determines it will remove a C-4 Code because of administrative or disciplinary reasons, advance notification will be given. For example, Customs anticipates giving advance notification if a bar code label is of inadequate quality and Customs decides to remove the C-4 Code until better labels can be printed. Customs also anticipates giving advance notification when there are recurring discrepancies in documentation. However, when Customs determines it will remove a C-4 Code because of information it has received of a sensitive or enforcement nature, advance notification will not be provided. Notification in such circumstances would alert participants of Customs intent to examine merchandise or drivers and could compromise ongoing investigations.

Comment:

In proposed § 142.49(a), what does Customs mean by "willfulness"?

Response:

Customs means a knowing and intentional act or omission.

Comment:

In proposed § 142.49(b), why must entry filers indicate the reason for deleting a particular category of shipments from the Line Release system?

Response:

There may be reasons of which Customs should be aware so that it can ensure compliance and uniformity in other districts that may process Line Release shipments with the same commodity, shipper and/or consignee.

Comment:

Section 142.48 should be amended to provide that release data be printed on the face of the invoice wherever possible and that release data be printed on other agency documentation required to be presented at the time of release.

Response:

Section 142.48, as proposed, provides that release data will be printed on the invoice. It is silent as to where on the invoice. Frequently, there is no space on the front of the invoice to print release data. Customs believes that the location on the invoice where the data is printed need not be addressed in the regulations and that it should be left to the discretion of the releasing officer to determine the easiest, fastest and most legible place to print the data. If at a later time Customs determines that the release data should appear at a more specified location on the invoice, Customs will amend the regulations.

Regarding printing release data on other agency documentation, Customs agrees that when the required documentation is presented at the time of release, Customs may print the release data on the other agency documentation. Section 142.48 is amended accordingly.

Comment:

There is a potential lack of uniformity if a District Director is allowed the authority to deny a Line Release application even when it has been approved in another district.

Response:

While Customs will make every attempt to maintain the District Director's authority to approve or deny Line Release applications, administrative procedures have been developed in an effort to bring uniformity to the process. As part of the review process, the district is required to determine if the application has been approved in another district. Approval in another district is a factor which should be taken into consideration before rejecting an application. Applicants whose request for Line Release has been denied in one district, but previously approved in another district, may submit the denied application to the District Director to be forwarded to the Assistant Commissioner, Office of Information Management. The Office of Information Management will coordinate review and will notify the District Director of the final determination. The language in section 142.43 has been changed to reflect these administrative procedures.

Comment:

Specific language regarding other government agencies should be included in the Line Release regulations, especially in the approval process.

Response:

Customs believes that the Line Release regulations need not detail or refer to other agency regulations. As set forth in Part 12 of the Customs Regulations, Customs enforces the laws of many agencies regarding importations. In administering Line Release, Customs will continue to enforce the laws of other agencies by routing applications to other agencies for review and, at times, referring merchandise to other agencies for examination. Other agencies can rest assured that Customs will adjust examination factors to meet other agency examination or sampling requirements. Customs believes, however, that setting forth in the regulations how it will administer Line Release merchandise with each and every agency is unnecessary. It should be noted that proposed § 142.46(c) does provide that if a Line Release shipment requires other agency documentation, the Customs officer at the Line Release site will be alerted to that requirement electronically when he verifies the data on the bar code with the information on the invoice so that other agency requirements can be checked.

Comment:

Will immigration clearance of drivers of Line Release vehicles delay the processing of cars at Line Release ports?

Response:

While Customs cannot dispense with immigration formalities for drivers of Line Release vehicles, the cross-designation of land border Customs inspectors as Immigration and Naturalization Service inspectors allows the inspectors to inspect and clear drivers for immigration purposes on the primary lanes in most cases. There will be instances, however, in which a driver will have to be referred for an immigration secondary inspection.

Comment:

The requirement for a manifest on Line Release shipments is unnecessary because the bar code and invoice contain the elements required on a manifest.

Response:

Section 123.3(a), Customs Regulations, requires that all baggage or merchandise carried on a vehicle arriving from Canada or Mexico be listed on a manifest. Manifests are currently required because there is information on the manifest, such as the name of the carrier and the vehicle number, which is not on the bar code and invoice. Customs is currently looking into combining both the invoice and manifest information in one document. If Customs succeeds at this, a manifest would no longer be necessary, and the regulations would then be amended accordingly.

Comment:

A Line Release filer should be given the ability to cancel a Line Release transaction or to change a Line Release entry to a different entry type.

Response:

Once a Line Release transaction is started, only Customs can make changes. This is necessary so the Line Release system can be run smoothly. Accordingly, if a filer wishes to change the election as to whether the release should be considered an entry or an immediate delivery, the filer must submit a letter requesting such change to Customs. This is set forth in § 142.51. In addition, if an entry is inadvertently released under Line Release or if two entry numbers are inadvertently assigned to one transaction, a filer can request Customs to cancel the erroneously assigned entry number. The request to change to different entry types, however, creates difficulties. Aside from the ability to change an entry to an immediate delivery, Customs cannot change a Line Release entry to other types of entries. Other types of entries, such as in-bond or TIBs, have different transaction control numbers and different data requirements. Accordingly, Customs cannot entertain a request to change one entry type to another.

Comment:

Current Line Release system administration and use of tariff ranges result in too many bar codes. Examples of products that would have too many bar codes are gaskets made of paper, plastic, metal and cork, which due to their composition, cannot fit into a reasonable range and require separate product codes.

Response:

Customs Office of Automated Commercial Systems is administering Line Release to provide the greatest flexibility possible. While system modifications are being considered to accommodate these situations, Customs and trade participants must work within this limitation until these modifications are approved and implemented.

Comment:

Please clarify why it is necessary to distinguish between an entry and an immediate delivery when applying for Line Release.

Response:

In addition to immediate delivery for perishables, section 142.21, Customs Regulations, allows district directors to grant blanket authority for immediate delivery on importations arriving from contiguous countries. This has resulted in a difference in processing between the northern and southern borders. In general, all northern border district directors have granted blanket authority for immediate delivery for all transactions; on the southern border, district directors have granted authority for immediate delivery only for perishable products. Consequently, in the north, most transactions are filed as immediate deliveries with an occasional entry being filed, and in the south, most transactions are filed as entries with an occasional immediate delivery being filed. Because entry establishes rate of duty, and immediate delivery does not, it is critical that Customs establish, at the time of release, the entry or immediate delivery status of the release. The release document, CF 3461 ALT, allows filers to elect whether they are filing an entry or an immediate delivery at the time of release.

The Line Release system does not have a systemic capability to distinguish between an entry and an immediate delivery. Accordingly, § 142.42 provides that applicants state on the data loading sheet whether the transactions are to be considered an entry or an immediate delivery. This parallels the election of immediate delivery or entry that is made on the CF 3461 ALT. Filers wishing to change the designation of their form of release may do so pursuant to § 142.51 if they submit to the district director a written notice noting the C-4 Code, the change of designation, and the effective date of the change.

Customs is currently considering modifications to Line Release that will enable the system to differentiate between an entry and an immediate delivery. Until that time and the regulations are amended accordingly, participants must adhere to the procedures set forth in the regulations published today.

Comment:

Proposed § 142.45(b) should not be finalized because there are problems with multiple commodities being processed through the Line Release system.

Response:

Multiple commodity processing is working very well at most Line Release sites. While in some locations, system users are unfamiliar with the correct handling procedures for processing multiple commodities and the errors in handling cause inconvenience, Customs believes that the correct solution to these problems is not to eliminate multiple commodity processing, but to work with field users and trade participants to correct these errors through on-site training.

Comment:

The use of Line Release for Master Monthly Manifest procedures should be included in the regulations.

Response:

Customs disagrees. While the Customs Omnibus Budget Reform Act of 1989 provided for a test to convert manual monthly entries to Line Release, Customs believes that these procedures should not be included in the regulations at this time.

Comment:

The method for assigning entry numbers to Line Release transactions should be changed to allow a participant to provide an entry number for the release transaction, rather than having the system assign an entry number from the range provided by the filer.

Response:

Currently, the system does not have this capability. Customs agrees that if this capability existed, this would be beneficial to some users. Accordingly, Customs is considering modifications to the Line Release system which would allow Customs to release transactions with filer supplied numbers. If such modifications are made, Customs will amend the regulations accordingly.

CONCLUSION

After careful consideration of the comments received and further review of the matter, it has been determined that the amendments with the modifications discussed above should be adopted.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these amendments will not have a signifi-

cant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collection of information contained in this regulation is in § 142.42. The collection of information has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1515–0181. The estimated average burden associated with this collection of information is 25 hours per respondent or recordkeeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Washington, D.C. 20229, or the Office of Management and Budget, Attention: Desk Officer for the Customs Service, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

Drafting Information

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 142

Customs duties and inspection, Imports.

Amendments to the Regulations

Parts 142 and 178, Customs Regulations (19 CFR Parts 142 and 178), are amended as set forth below.

PART 142 – ENTRY PROCESS

1. The authority citation for Part 142 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. Part 142 is amended by adding a new Subpart D to read as follows:

SUBPART D – LINE RELEASE

Sec.

142.41 Line release.
142.42 Application for line release processing.
142.43 Line Release application approval process.
142.44 Entry number range.
142.45 Use of bar code by entry filer.
142.46 Presentation of invoice and assignment of entry number.
142.47 Examinations of Line Release transactions.
142.48 Release procedure.
142.49 Deletion of C-4 Code.
142.50 Line Release data base corrections or changes.
142.51 Changing election of entry or immediate delivery.
142.52 District-wide and multiple district acceptance of Line Release.

§ 142.41 Line Release.

Line Release is an automated system designed to release and track repetitive shipments. It is a method of entry or immediate delivery extended to importers of merchandise which Customs deems to be repetitive and high volume. Line Release may be used only at locations approved by Customs for handling Line Release.

§ 142.42 Application for Line Release processing.

In order to obtain approval for processing import transactions through Line Release, a broker or importer filing its own entries (entry filer) must submit an application to the District Director, signed by the entry filer, in a format described as a Line Release Data Loading Sheet. The application must be accompanied by a representative sample of an actual commercial invoice for the products sought to be processed under Line Release. The Line Release Data Loading Sheet must contain the following information with each information element appearing on a separate line.

(a) District or port where application is being made.

(b) Initiating Company Information: name, address, city, state, contact person, phone number of contact person, and signature.

(c) Listing of all districts in which the initiating company has filed a similar application for Line Release.

(d) Country of origin codes (ISO codes from Annex B of HTSUS) for the merchandise.

(e) Shipper or manufacturer information: name, address, city, province/state, country, postal code, indication by noting "M" or "S" whether this information relates to a manufacturer (M) or a shipper (S), and manufacturer identification number of the shipper or manufacturer.

(f) Importer information (if importer is different than filer): name, address, city, state and country, zip code, importer number, bond number, and surety code.

(g) Entry filer information: name, importer number, filer code, bond number, and surety code.

(h) Product information: product description, manifest unit of measure, HTSUS number described to sub-heading level for particular product or range of HTSUS numbers at sub-heading levels for multiple products for which Line Release is sought.

(i) Election of whether the Line Release transaction is to be considered an entry or an immediate delivery.

§ 142.43 Line Release application approval process.

(a) *District review.* The District Director shall review each Line Release application to determine whether the shipments qualify for Line Release processing. The District Director may contact the applicant for further information, if necessary. An application that fails to elect whether the Line Release transaction is to be considered an entry or an immediate delivery will be returned to the applicant. If all required in-

formation is submitted, the application will be forwarded to Headquarters for final processing.

(b) *Assignment of C-4 Codes.* A C-4 Code (Common Commodity Classification Code), which is a unique code identifying the shipper or manufacturer, importer, entry filer, and the product for each Line Release shipment, shall be assigned by Headquarters to each application approved for Line Release. Headquarters shall annotate each approved application with a C-4 Code and return the application to the District Director who shall return the approved application to the entry filer.

(c) *Denial of Line Release application.* If the District Director is considering the denial of a Line Release application, consideration shall be given to whether an application by the same filer for the same transaction has been approved in another district. If there is not an approved application in another district and the District Director determines that the application shall be denied, the application shall be noted denied and returned to the entry filer without a C-4 Code annotation by the District Director. If an application has been approved in another district, but the District Director still questions whether the application should be approved in his district, the District Director shall forward the application to the Assistant Commissioner, Office of Information Management. The Office of Information Management will review the application and will notify the District Director of the final determination.

§ 142.44 Entry number range.

After an application for Line Release has received final approval, filers must provide the District Director, in writing, with a range of entry numbers for use in the system so that an entry number can be assigned automatically to each Line Release transaction. For the purposes of this subpart, "entry number", when the release is an immediate delivery, merely refers to the Line Release transaction number; this number does not become the actual entry number until an entry for the merchandise released under the immediate delivery procedure is filed. A separate range must be provided for each Line Release site in the district. These entry numbers shall be used for assignment within the Line Release system. Entry filers shall not assign these numbers to other entry transactions.

§ 142.45 Use of bar code by entry filer.

(a) *Printing of C-4 Code.* Upon receipt of an approved Line Release application, the entry filer, in accordance with instructions from the District Director, shall preprint invoices with the C-4 Code in bar code and alpha-numeric format or print labels with the necessary information. Bar codes shall be printed in accordance with the specifications stated in Customs Publication 561 (*Line Release Overview*). Labels or preprinted invoices also shall state the name of the shipper or manufacturer of the product and the name of the importer of record, if other than the entry filer, above the bar code and the name of the entry filer and a product description below the bar code.

(b) *Multiple commodity processing.* Multiple commodity processing allows more than one product to be released under one entry number. The shipper/manufacturer, importer of record and the entry filer must be the same. The product description is the only variable allowed. The commodities should be listed on one invoice with C-4 Code labels for each commodity attached to the invoice.

(c) *Distribution of labels.* If labels are used, the labels shall be affixed to the invoices in accordance with instructions from the District Director. The entry filer may either affix the labels or distribute the labels to the shippers/manufacturers and instruct them in the use and placement of the labels.

§ 142.46 Presentation of invoice and assignment of entry number.

(a) *Presentation of invoice.* When merchandise that has been approved for Line Release is imported at a Line Release site, the carrier, importer or filer shall present Customs with an invoice with the bar code or codes printed or affixed and, according to the method of transportation, the appropriate manifest document.

(b) *Verification of data.* If after scanning the bar code at the Line Release site, the Customs officer verifies the data on the bar code with the information on the invoice, he will key the quantity on the invoice and an entry number will be automatically assigned to the transaction. If there are any differences between the system data and the invoice and bar code, including any differences in entry filer, the Customs officer shall order an examination.

(c) *Other agency documentation.* If the Line Release shipment requires other agency documentation, the Customs officer at the Line Release site will be alerted to that requirement electronically when he verifies the data on the bar code with the information on the invoice. If the required form is presented to the officer with the documentation package, the shipment may be released.

§ 142.47 Examinations of Line Release transactions.

(a) *General.* Merchandise imported under Line Release generally may be released without further Customs processing. Customs, however, may choose to inspect any Line Release shipment. Examinations may be either specifically ordered by the Customs officer or random.

(b) *Voiding of Line Release Transaction.* Customs may void a Line Release transaction because of an examination. If this occurs, Customs will return the invoice to the carrier, and the entry filer, in order to enter merchandise, shall prepare and submit either a CF 3461 or 3461 Alternate.

§ 142.48 Release procedure.

(a) *General.* When the Customs officer at the Line Release site determines that a shipment is ready for release, release data, consisting of the entry number, the date and time of release, the inspector's badge number, the quantity and unit of measure, and the C-4 Code will be printed

on the invoice and the manifest document and, when other agency documentation is presented, may be printed on that documentation. The invoice shall be returned to the entry filer and the manifest document shall be retained by Customs.

(b) *Notification to non-ABI participants.* The returned invoice with the release data shall be the release notification to non-ABI participants.

(c) *Notification to ABI participants.* If the Line Release entry filer is an operational ABI participant, the filer shall receive an electronic notification of the release consisting of the importer of record number, the district/port of entry, the filer code, the entry number, the date and time of release, the manufacturer code, the quantity and unit of measure, the release site, the HTSUS number(s), the C-4 Code and the country or countries of origin.

§ 142.49 Deletion of C-4 Code.

(a) *By Customs.* A District Director may temporarily or permanently delete an entry filer's C-4 Code without providing the participant with any justification and without prior notification in cases of willfulness or when public health, interest, or safety so requires, thereby revoking the filer's use of Line Release.

(b) *By entry filer.* Entry filers may delete C-4 Codes from Line Release by notifying the District Director in writing on a Deletion Data Loading Sheet. Such notification shall state the C-4 Code which is to be deleted, the district or port where the C-4 Code is to be deleted and the reason for the requested deletion. A copy of the originally approved Data Loading Sheet must be submitted with the Deletion Data Loading Sheet. If only a temporary deletion is desired, the filer shall state the requested effective date for the deletion and the date the C-4 Code is requested to be returned to Line Release processing.

§ 142.50 Line Release data base corrections or changes.

The applicant shall notify the District Director of any changes in names, importer or filer numbers or bond information on a Line Release Data Loading Sheet as soon as possible. Notification shall be accomplished by the submission of a copy of the original loading sheet with a Correction Data Loading Sheet.

§ 142.51 Changing election of entry or immediate delivery.

An applicant who has already received a C-4 Code and wishes to change the election chosen on his Line Release application as to whether the release should be considered an entry or an immediate delivery must submit a letter requesting such change to the district director where the C-4 Code is used. This letter must include the C-4 Code to be changed and the date the change is to be effective. If the requested change is for a temporary time period, the letter shall include the date the releases are to return to the release type originally requested. Applications that fail to state the effective dates of the changes requested will be returned to the applicant.

§ 142.52 District-wide and multiple district acceptance of Line Release.

(a) *District-wide processing.* If a C-4 Code has been approved by a District Director, the C-4 Code may be used at any Line Release site in the district.

(b) *Multiple district processing.* In order for a C-4 Code approved in one district to be used in another district, the entry filer must submit an application to the District Director of the other district. While uniform criteria shall be applied to approving similar shipments for Line Release in all districts, a District Director may exercise his discretion to deny Line Release in a district even though a similar shipment may be approved in another district.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178, Customs Regulations (19 CFR Part 178) continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in the appropriate numerical sequence according to the section number under the column indicated:

§ 178.2 Listing of OMB Control Numbers.

19 CFR section	Description	OMB Control No.
§ 142.42	Line Release application.	1515–0183

CAROL HALLETT,
Commissioner of Customs.

Approved: September 18, 1992.
PETER K. NUNEZ,
Assistant Secretary of Treasury.

[Published in the Federal Register, September 24, 1992 (57 FR 44090)]

U.S. Customs Service

General Notices

APPLICATION TO RESTRICT PARALLEL IMPORTS BEARING GENUINE TRADEMARKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of application to restrict parallel imports bearing genuine trademarks.

SUMMARY: This document seeks comments on an application submitted to prevent the importation of certain goods bearing genuine "Yamaha" trademarks under the terms of a district court injunction requiring the U.S. Customs Service to provide protection to trademarks meeting certain criteria.

DATES: Comments must be received on or before October 26, 1992.

ADDRESSES: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, N.W., Room 2104, Washington, D.C. 20229. All documents submitted will be available for viewing by the public at the same address on weekdays between the hours of 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Room 2104, Washington, D.C. 20229 (202–927–0850).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 28, 1992, The United States District Court for the District of Columbia issued an amended order in *Lever Brothers Co. v. United States,* No. 86–3151 (HHG), which enjoined the U.S. Customs Service from allowing the importation of foreign-made goods otherwise admissible under 19 C.F.R. § 133.21(c)(2) that bear a trademark identical to a valid United States trademark but which are materially physically different. As a result of this court action and pending further action by a court or final resolution of *Lever Bros. Co. v. United States,* Appeal No. 92–5185, owners of recorded trademarks that are under common ownership or control with foreign companies that use the trademark on foreign-made goods with material physical differences can apply to Customs to stop the importation of those foreign-made goods.

In order to receive the protection as outlined by the court, applicants must first show that the trademark owner requesting the protection falls within the scope of section 133.21(c)(2) of the Customs Regulations, as opposed to section 133.21(c)(1). The District Court for the District of Columbia ordered Customs to provide protection only when goods would otherwise be admissible under section 133.21(c)(2), which applies to goods of a foreign trademark owner under common ownership or control with the U.S. trademark owner. Section (c)(1) applies to goods of a foreign trademark owner that also owns the U.S. trademark.

Applicants for protection under the terms of the court order must also show Customs that the foreign affiliate of the U.S. trademark owner uses the mark on goods with material physical differences. For this, applicants must show Customs that the goods are different, and also that the difference is "material". On June 26,1992, by publication in the Federal Register (57 FR 28605), Customs invited trademark owners to notify Customs if they believe that the trademark owner and the goods bearing the trademark meet these criteria.

An application has been submitted pursuant to the June 26, 1992, Federal Register notice, for a restriction against the importation of goods bearing genuine "Yamaha" trademarks. Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person opposing the application. Notice of the action taken in response to the application will also be published in the Federal Register.

Dated: September 21, 1992.

BARRY P. MILLER,
Acting Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, September 25, 1992 (57 FR 44403)

APPLICATION FOR RECORDATION OF TRADE NAME: "ASHLEY FURNITURE INDUSTRIES, INC."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "ASHLEY FURNITURE INDUSTRIES, INC." used by ASHLEY FURNITURE INDUSTRIES, INC., a corporation organized under the laws of the State of California, located at 350 Madison Street, Arcadia, Wisconsin 54612.

The application states that the trade name is used in connection with furniture.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before November 23, 1992.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Room 2104), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gina D'Onofrio, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229, (202–566–6956).

Dated: September 15, 1992.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, September 24, 1992 (57 FR 44228)]

U.S. Customs Service

Proposed Rulemakings

19 CFR Part 191

APPEAL TO HEADQUARTERS OF DENIAL OF EXPORTER'S SUMMARY PROCEDURE TO A DRAWBACK CLAIMANT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide an appeal to Customs Headquarters for drawback claimants that are denied the use of the Exporter's Summary Procedure (ESP), or whose ESP privileges are revoked. Currently, appeals are reviewed by the same regional office that made the original decision to deny or revoke the privilege. This amendment will provide a regulatory right for having an impartial review.

DATE: Comments must be received on or before November 23, 1992.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, Entry Division, 202–927–0916.

SUPPLEMENTARY INFORMATION:

Background

Drawback is defined in section 191.2(a) of the Customs Regulations (19 CFR 191.2(a)), as a refund or remission, in whole or part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected, because of a particular use made of the merchandise on which the duty, tax, or fee was assessed or collected. To obtain drawback, a claimant must show that the eligible merchandise was exported. In order to improve administrative efficiency in providing proof of exportation, under procedures set forth in section 191.53, Customs Regulations (19 CFR 191.53), an exporter-claimant may use a procedure called the Exporter Summary Procedure (ESP). This procedure allows claimants to provide

Customs with a chronological summary of exports in lieu of actual documentary evidence of exportation. To use ESP a drawback claimant must receive approval from the regional commissioner where the drawback claim will be filed. Permission to use this procedure will be granted if the regional commissioner concludes that its use would contribute to administrative efficiency, and the exporter claimant is not delinquent or otherwise remiss in his transactions with Customs.

If it is decided to deny a request for ESP or to revoke ESP privileges, a letter to that effect will be sent to the claimant explaining what corrective action must be taken. This letter will also include a time frame in which the applicant/claimant may reapply for the privilege.

Currently, if a drawback claimant is denied the use of ESP, the only recourse available is to appeal to the same Customs regional office that made the original decision to deny or revoke the ESP privileges. This proposal will provide claimants with a regulatory right to have decisions to revoke or deny ESP impartially reviewed by the Office of Trade Operations of the Office of Commercial Operations at Customs Headquarters.

COMMENTS

Before making a determination in this matter, Customs will consider any written comments timely submitted. Comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified, for the reasons stated in this preamble, that the proposed amendments set forth in this document, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in 1(b) E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Sheryl Rosenow, Entry Rulings Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 191

Claims, Customs duties and inspection, Exports, Reporting and recordkeeping requirements.

PROPOSED AMENDMENTS

It is proposed to amend Part 191 of the Customs Regulations (19 CFR Part 191), as set forth below:

PART 191 – DRAWBACK

1. The general authority citation for Part 191 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * * * *

2. It is proposed to amend section 191.53, by adding a paragraph (f) to read as follows:

§ 191.53 Exporter's summary.

* * * * * * *

(f) *Appeals.*

Permission to use this procedure may be denied or revoked by the regional commissioner based on the claimant's prior and continuing record of transactions with Customs. Reasons for denial or revocation may include evidence of inadequate or misrepresented export documentation, export violations, unpaid bills, or lack of adequate documentation to support fungibility or possession requirements (if request for ESP is linked to a specific claim). Upon receipt of a written notice of denial or revocation, the claimant may appeal within 60 days from the date of the notice. Appeals alleging discrepancies in the documentary or evidentiary bases of the revocation or denial shall be made within 60 days to the regional commissioner. All other appeals, including that of denial of an appeal by the regional commissioner, shall be made in writing to the Director, Office of Trade Operations, at Customs Headquarters, within 60 days of the date of notice of the denial or revocation, or denial of an appeal to the regional commissioner. Claimants must include all appropriate documentation with their appeal. Claimants will be notified by Customs of decisions on appeals within 60 days of receipt of the appeal.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: August 28, 1992.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 24, 1992 (57 FR 44145)]

19 CFR Parts 151 and 152

ELECTRONIC TRANSMISSION OF CUSTOMS FORMS 28 AND 29

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to provide that entry filers who have access to the Automated Broker Interface (ABI) may elect to receive Customs Form 28, Request for Information, and Customs Form 29, Notice of Action, electronically through ABI. This proposal, if adopted, will eliminate the expense of preparing and handling certain paper documents.

DATES: Comments must be received on or before November 23, 1992.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Richard J. Bonner, Office of Automated Commercial Systems, (202) 927–1081.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Automated Commercial System (ACS) of Customs is a public-private computerized data processing telecommunications system, linking customhouses, members of the import trade community, and other government agencies with the Customs computer. Trade users file import data required by Customs and other agencies electronically, receive needed information on cargo status electronically, and may query Customs electronic files in preparing their submissions. Duties, taxes and fees may be paid by electronic statement, through a Treasury-approved clearinghouse bank.

The Automated Broker Interface (ABI), a module of ACS, is used by entry filers to transmit electronic entry declarations and associated transactions to Customs, and to receive entry processing results from Customs. The system currently can be used by customs brokers and importers and software vendors having ABI capabilities. All of the trade users participate voluntarily.

Customs uses the data received from the trade in many ways: to control and release cargo, develop and verify foreign trade statistics, value and classify merchandise, verify visas and administrative quotas, collect $18 billion in duty, taxes, fees and other revenue, and enforce trade laws and regulations (some 400 laws for 40 agencies). Information about the disposition of cargo for Customs and other agencies is communicated to both trade and other agency users through ACS electronically.

Automation of Customs Forms 28 and 29 would be another step in the elimination of paperwork, resulting in the further streamlining of Customs and trade community procedures.

CURRENT PROCEDURES

To determine the correct classification and valuation of imported merchandise, it is sometimes necessary for the district director to obtain samples of merchandise or other information necessary for the classification or appraisement of the merchandise. Section 151.11, Customs Regulations (19 CFR 151.11), requires that the district director send Customs Form 28, Request for Information, to the importer in order to request samples or additional examination packages of merchandise which have been released from Customs custody. Current procedures provide that a copy of the Customs Form 28 be provided to the importer's customs broker. The appropriate Customs officer prepares the form manually.

After Customs determines the classification of merchandise and appraises it, if the district director believes the entered rate or value of any merchandise is too low, or if he finds that the quantity imported exceeds the entered quantity, § 152.2, Customs Regulations (19 CFR 152.2), provides that the district director shall send Customs Form 29, Notice of Action, to the importer if the estimated aggregate of the increase in duties on that entry exceeds a certain amount of money. A copy of Customs Form 29 is also provided to the importer's customs broker. The form is prepared by the appropriate Customs officer manually.

PROPOSED PROCEDURES

This document proposes that in lieu of preparing Customs Forms 28 and 29 manually, the Customs officer will prepare the forms on an ACS computer system terminal. If the referenced entry was filed electronically via ABI, and the entry filer elects to receive Customs Forms 28 and 29 electronically, the information will be transmitted to the entry filer electronically via ABI and no documents will be mailed by Customs. If the ABI entry filer is a Customs broker, as agent for the importer, it will be the responsibility of the customs broker ABI entry filer to provide this information to the importer.

If the entry filer does not elect to receive Customs Forms 28 and 29 electronically, the ACS system will automatically generate the printed forms and Customs will mail the forms to the importer and/or customs broker according to current procedures.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between

the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

Because this document merely provides for an alternative means of communicating information to trade users, the document does not meet the criteria for a "major rule" as defined in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

For the same reason stated in the above paragraph, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the proposed amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 151

Cigars and cigarettes, Cotton, Customs duties and inspection, Fruit juices, Laboratories, Metals, Oil Imports, Reporting and recordkeeping requirements, Sugar, Wool.

19 CFR Part 152

Customs duties and inspection.

PROPOSED AMENDMENTS

It is proposed to amend Parts 151 and 152 of the Customs Regulations (19 CFR Parts 151, 152) as set forth below:

PART 151 – EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The general authority citation for Part 151, Customs Regulations, and specific authority citation for Subpart A would continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 8 and 9, Harmonized Tariff Schedule of the United States), 1624. Subpart A also issued under 19 U.S.C. 1499. * * *

* * * * * * *

2. It is proposed to revise § 151.11 to read as follows:

§ 151.11 Request for samples or additional examination packages after release of merchandise.

If the district director requires samples or additional examination packages of merchandise which have been released from Customs custody or needs other information for the classification or appraisement of the merchandise, he shall send the importer a written request, on Customs Form 28, Request for Information, or other appropriate form, to submit the necessary information, samples or packages. Alternatively, if the entry filer elects to receive the Customs Form 28 electronically through ABI, the district director will transmit the form electronically to the ABI entry filer. If the entry filer is a Customs broker, he is responsible for providing this information to the importer. If the request is not promptly complied with, the district director may make a demand under the bond for return of the necessary merchandise to Customs custody in accordance with § 141.113 of this chapter.

PART 152 – CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

1. The general authority citation for Part 152 would continue to read as follows:

Authority: 19 U.S.C. 66, 1401a, 1500, 1502, 1624;

* * * * * * *

2. It is proposed to amend § 152.2 by adding a new second sentence to read as follows:

§ 152.2 Notification to importer of increased duties.

* * * Alternatively, if the entry filer elects to receive Customs Form 29 electronically through ABI, the district director will transmit the form electronically to the ABI entry filer. If the entry filer is a Customs broker, he is responsible for providing this information to the importer. * * *

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CAROL HALLETT,
Commissioner of Customs.

Approved: September 17, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 24, 1992 (57 FR 44143)]

19 CFR Part 142

EXPORTATION FOLLOWING SPECIAL PERMIT FOR IMMEDIATE DELIVERY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by allowing a direct exportation entry to be filed, instead of an entry summary for consumption, on merchandise released under a special permit for immediate delivery which is exported prior to the expiration of the time-period for filing entry documentation. Presently, only fresh fruits and vegetables for human consumption, absolute quota, and prohibited merchandise may be exported upon the filing of a transportation and exportation entry or direct exportation entry. However, all other eligible merchandise released under an immediate delivery permit, when exported prior to the expiration of the prescribed time-period for filing entry documentation, still requires the filing of an entry summary followed by a same condition drawback entry for the duty refund. It is proposed that when the released goods are exported before the expiration of the time-period for filing entry documentation, an importer will no longer be required to file an entry summary, pay the duties and then file a same condition drawback claim for the duty refund. By implementing this proposed change, there would be a savings in time and money for both the trade and the Customs Service.

DATE: Comments must be received on or before November 23, 1992.

ADDRESS: Comments (preferably in triplicate) must be submitted to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW, Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Kevin Weeks, Entry Operations Branch, Office of Trade Operations (202–927–1083).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 448(b), Tariff Act of 1930, as amended (19 U.S.C. 1448(b)), provides that the Secretary of the Treasury is authorized to provide by regulations for the issuing of special permits for delivery, prior to formal entry thereof, of perishable articles and other articles, the immediate delivery of which is necessary. Such a permit may be issued for such articles for which delivery can be permitted with safety to the revenue in order to avoid unusual loss or inconvenience to an importer or to the carrier bringing the merchandise to the port.

Customs has interpreted the term "formal entry" in 19 U.S.C. 1448(b) to mean the process of making entry and does not specify a kind of entry.

Presently, only fresh fruits and vegetables for human consumption, absolute quota, and prohibited merchandise may be exported upon the filing of a transportation and exportation entry or direct exportation entry. However, all other eligible merchandise released under an immediate delivery permit (19 CFR 142.21) when exported prior to the expiration of the prescribed time-period for filing entry documentation (19 CFR 142.23) still requires the filing of an entry summary followed by a same condition drawback entry under 19 U.S.C. 1313(j)(1) for the refund of duties.

After reviewing the present regulatory language of section 142.22(b)(3) of the Customs Regulations, Customs believes that it may be appropriate to expand paragraph (b)(3)'s coverage regarding direct exportation to all goods eligible for special permit for immediate delivery when these goods, which are conditionally released, are exported before entry is required to be made pursuant to 19 CFR 141.68(c). *See* 19 CFR 142.23. Customs believes that this action is not inconsistent with 19 U.S.C. 1448(b). It is proposed that when the released goods are exported before the expiration of the time-period for filing entry documentation, an importer will no longer be required to file an entry summary and pay the duties. Filing a direct exportation entry, in lieu of an entry summary, eliminates the need for the importer to also file a same condition drawback claim under 19 U.S.C. 1313(j)(1) and receive a refund of only 99% of the duties paid. Please note, however, that since estimated duties are not required to be filed until 10-working days after the merchandise was released (19 CFR 142.23) under an application for special permit for immediate delivery, when a direct export entry is utilized instead of an entry summary, no refund of duties is necessary since no duties were paid. *See* 19 U.S.C. 1557; 19 CFR Part 191, Subpart M. By implementing this proposed change, there would be a savings in time and money for both the trade and the Customs Service. This change is being made to facilitate trade by reducing the paperwork burden and associated costs in human and financial resources for both importers and the Customs field offices.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, NW, Washington, D.C.

REGULATORY FLEXIBILITY ACT

Based on the discussion above, and pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified

that the proposed amendments set forth in this document, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Joanne Stump, Entry Rulings Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN PART 142

Customs duties and inspection, Imports.

PROPOSED AMENDMENT

It is proposed to amend Part 142, Customs Regulations (19 CFR Part 142), as set forth below.

PART 142 – ENTRY PROCESS

1. The general authority citation for Part 142 would continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. It is proposed to revise paragraph (b)(3) of section 142.22 to read as follows:

§ 142.22 Application for special permit for immediate delivery.

* * * * * * *

(b) * * *

(3) An entry for transportation and exportation, immediate transportation without appraisement, or direct exportation, which shall be filed in those circumstances under § 142.21(b) and (e)(2) of this part; or entry for transportation and exportation, or direct exportation, which shall be filed in the circumstances under § 142.28 of this part; or an entry for direct exportation for those released articles which are exported before the expiration of the prescribed time-period of § 142.23 or

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MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: September 17, 1992.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 24, 1992 (57 FR 44142)]

19 CFR Part 10

TEMPORARY IMPORTATION BONDS; ANTICIPATORY BREACH, ASSESSMENT AMOUNTS, PETITIONS FOR RELIEF

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to permit anticipatory breach and provide for early payment of liquidated damages in Temporary Importation Bond cases. It also proposes to amend the Regulations to permit assessment of liquidated damages in excess of double the duties in those cases where the district director requires extra bonding in order to protect the revenue and that the term "duties" for TIB bonding and assessment shall also include any applicable merchandise processing fees or harbor maintenance fees that otherwise would be charged on an entry for consumption. Finally, the document proposes to amend the Regulations to eliminate forwarding of petitions for relief in TIB cases to Customs Headquarters when the bond principal or surety is dissatisfied with the decision on the petition afforded by the district director, and provide for their processing in the same manner as other liquidated damages cases.

DATE: Comments must the received on or before November 30, 1992.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings, 202–927–0870.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under the provisions of Chapter 98, Subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS), merchandise may be entered under the terms of a Temporary Importation Bond (TIB) without the payment of duties if the merchandise is entered for a specific purpose enumerated in Subchapter XIII, HTSUS. Per U.S. Note 1 to Subchapter XIII, the merchandise is permitted to remain in the United States for a one-year period subsequent to the date of importation with a maximum of two one-year extensions allowed. Prior to the expiration of the bond period or any properly approved extension thereof, the merchandise must be exported or destroyed under Customs supervision. Failure to export or destroy in a timely manner results in the imposition of liquidated damages against the importer.

Instances arise where, after initiation of a TIB entry, the importer decides that the merchandise will remain in the United States in violation

of the terms of the bond. Rather than wait for the one-year period to end and for liquidated damages to be assessed, importers have inquired as to the possibility of early payment of liquidated damages. Customs Regulations currently do not provide for an anticipatory breach of a TIB. Through this document, it is proposed to amend § 10.39 to permit said anticipatory breach and allow the importer to pay the full measure of liquidated damages and thereby close the bond. Through payment of the liquidated damages, the importer will waive his right to receipt of notice of a claim for liquidated damages pursuant to § 172.1(a) and concomitantly waive his right to file a petition for relief.

For TIB entries, the provisions of 10.31(f) require that a bond shall be given containing the conditions set forth in § 113.62 in an amount equal to double the duties which it is estimated would accrue (or such larger amount as the district director shall state in writing to the entrant is necessary to protect the revenue) had all the articles covered by the entry been entered under an ordinary consumption entry or in an amount equal to 110 percent of the duties in the cases of samples used solely for taking orders, motion-picture advertising films and professional equipment and tools of trade. By contrast, under the provisions of 10.39(d)(1), if any article entered under Chapter 98, Subchapter XIII, HTSUS, has not been exported or destroyed in accordance with the regulations within the period of time during which the articles may remain in the Customs territory of the United States under bond (including any lawful extension), the district director shall make a demand in writing under the bond for the payment of liquidated damages equal to double the estimated duties applicable to such entry, unless a lower amount is prescribed by § 10.31(f).

On the one hand, § 10.31(f) empowers the district director to require a bond in excess of double or 110 percent of the duties, but the provisions of § 10.39(d)(1) only permit him to assess liquidated damages at double the estimated duties, 110 percent of the duties or such *lower* amount as prescribed by section 10.31(f). These regulations can provide anomalous results and inefficient protection of the revenue. Accordingly, this document proposes to amend § 10.39(d)(1) to permit, in the case of breach of a TIB, assessment of liquidated damages in an amount equal to double the estimated duties, 110 percent of the estimated duties or any different amount prescribed by § 10.31(f) rather than only a lower amount.

When a TIB entry is filed, no merchandise processing fees or harbor maintenance fees are charged to the importer of record. However, § 111 of the Customs and Trade Act of 1990 (Pub. L. 101382) amended 19 U.S.C. 58c(g) (the statute which requires payment of the merchandise processing fee) to provide that all administrative and enforcement provisions of the Customs laws and regulations, except those relating to drawback, shall apply with respect to any fee prescribed under § 58c(a) (which requires payment of the merchandise processing fee), and with respect to persons liable therefore, as if such fee is a customs duty. Any

penalty which is expressed in terms of a relationship to the amount of the duty (e.g., liquidated damages expressed in terms of an amount equal to double the estimated duties due on an entry) shall be assessed as a multiple of the unpaid fee. Accordingly, when calculating the bond amount or the measure of liquidated damages for breach of a TIB, the amount of estimated duties should include duties plus the merchandise processing fees that would have been applicable to the entry had an entry for consumption been filed.

The provisions of the Harbor Maintenance Revenue Act of 1986 (Pub. L. 99–662) impose a harbor maintenance fee on any importers, exporters, and domestic shippers of commercial cargo who use any port. The language of the statute authorizing assessment of the harbor maintenance fee also notes that all customs administrative and enforcement provisions of law and regulation shall apply to the fee as though such fee was a customs duty. Section 4462(f)(1) of the statute indicates that "any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo."

As with the merchandise processing fee, any harbor maintenance fee which would otherwise be due and owing on an entry for consumption is not paid if a TIB entry is made. As with the merchandise processing fee, the unpaid harbor maintenance fee should be considered as part of the amount equal to estimated duties that would be chargeable had the merchandise which is the subject of the TIB been entered for consumption.

Accordingly, when calculating the bond amount or the measure of liquidated damages for breach of a TIB, the amount of estimated duties due should include duties plus the merchandise processing fees plus the harbor maintenance fees that would have been applicable to the entry had an entry for consumption been filed. This document proposes to amend § 10.31(f) and § 10.39(d)(1) to provide that the bond amount and the liquidated damages for breach of a TIB will include as appropriate, an amount equal to double or 110 percent of the estimated duties, fees and taxes due if the entry had been filed as a consumption entry.

Under the provisions of § 10.39(e) of the Customs Regulations, if there has been a default with respect to all the articles covered by the bond and a written petition for relief is filed timely, the regulations state that the petition "shall be transmitted to Headquarters, U.S. Customs Service with a full report of the facts, unless it is allowed by the district director in whole or in part in accordance with this regulation, * * *." This language noting referral to Headquarters is unique to TIB cases in which all the articles covered by the bond are in default and the district director allows no mitigation. In order to avoid confusion and simplify the processing of fines, penalties and forfeiture matters, the jurisdictional amount found in § 172.21 should govern review of all petitions. Accordingly, this document proposes to amend section 10.39(e) to remove the reference regarding referral of these petitions to Customs Headquarters.

COMMENTS

Before making a determination in this matter, Customs will consider any written comments timely submitted. Comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12291

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Permitting anticipatory breach of Temporary Importation Bond provisions allows early removal of an otherwise outstanding contingent liability of an importer, while eliminating the requirement that petitions be decided at Customs Headquarters reduces delays in processing, both to the benefit of importers. As noted above, provisions relating to inclusion of the merchandise processing fee and the harbor maintenance fee are dictated by the provisions of the statute, and are not within agency discretion. Accordingly, the amendments are not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604. Because the document does not meet the criteria for a "major rule" as specified in E.O. 12291, no regulatory impact analysis has been prepared.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspection, Imports, Surety Bonds.

PROPOSED AMENDMENTS

Accordingly, for the reasons set forth below, it is proposed to amend Part 10, Customs Regulations (19 CFR Part 10), as follows:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation and relevant specific authority citations for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

2. It is proposed to amend § 10.31 by revising the first two sentences of paragraph (f) to read as follows:

§ 10.31 Entry; bond.

* * * * * * *

(f) With the exceptions stated herein, a bond shall be given on Customs Form 301, containing the bond conditions set forth in § 113.62 of this chapter, in an amount equal to double the duties, including fees,

which it is estimated would accrue (or such larger amount as the district director shall state in writing to the entrant is necessary to protect the revenue) had all the articles covered by the entry been entered under an ordinary consumption entry. In the case of samples solely for use in taking orders entered under subheading 9813.00.20, HTSUS, motion-picture advertising films entered under subheading 9813.00.25, HTSUS, and professional equipment, tools of trade and repair components for such equipment or tools entered under subheading 9813.00.50, HTSUS, the bond required to be given shall be in an amount equal to 110 percent of the estimated duties, including fees, determined at the time of entry. * * *

* * * * * * *

3. It is proposed to amend § 10.39(d)(1) by removing the word "lower" and replacing it with the word "different" in the first sentence, and by adding a second sentence to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * * * *

(d)(1) * * * For purposes of this section, the term estimated duties shall include any merchandise processing fees and harbor maintenance fees applicable to such entry. * * *

* * * * * * *

4. It is proposed to revise the first sentence of subsection 10.39(e) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * * * *

(e) If there has been a default with respect to all the articles covered by the bond and a written petition for relief has been timely filed as provided in part 172 of this chapter, it shall be reviewed by the district director if the full amount of the claim does not exceed $100,000 and by the Director, International Trade Compliance Division, Customs Headquarters, if the full amount of the claim exceeds $100,000.

* * * * * * *

5. It is proposed to amend § 10.39 by redesignating paragraph (g) as paragraph (h) and add a new subsection (g) to read as follows:

§ 10.39 Cancellation of bond charges.

* * * * * * *

(g) *Anticipatory breach.* If an importer anticipates that the merchandise entered under a Temporary Importation Bond will not be exported or destroyed in accordance with the terms of the bond, the importer may advise the district director in writing before the bond period has expired

of the anticipatory breach. At the time of written notification of the breach, the importer shall pay to Customs the full amount of liquidated damages that would be assessed at the time of breach of the bond, and upon such notification and payment the entry will be closed and the bond will be canceled. By this payment, the importer waives his right to receive a notice of claim for liquidated damages as required by § 172.1(a) of this chapter or to file any petition for relief on the matter.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: September 22, 1992.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 29, 1992 (57 FR 44714)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–157)

ALLIED-SIGNAL AEROSPACE CO., GARRETT ENGINE DIV. AND GARRETT AUXILIARY POWER DIV., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00571

Pursuant to Rule 56.1 of the Rules of this Court, plaintiff moves for judgment on the agency record claiming that the Department of Commerce, International Trade Administration's ("Commerce") determination was unsupported by substantial evidence and not in accordance with law. Specifically, plaintiff claims that, in calculating plaintiff's dumping margins, Commerce punitively applied as best information available the highest of other companies' dumping rates from an earlier less than fair value investigation, rather than rates from the current administrative review.

Held: Plaintiff's motion is denied as Commerce was justified in its selection of best information available since responses to Commerce's questionnaire were inadequate and since plaintiff offered no evidence showing that recent margins were more probative of current conditions than the highest prior margins.

[Plaintiff's motion for judgment on the agency record denied; case dismissed.]

(Dated September 17, 1992)

Adduci, Mastriani, Meeks & Schill (*Louis S. Mastriani* and *Gregory C. Anthes*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *John D. McInerney*, Senior Counsel, and *Craig R. Giesze*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine* and *Robert A. Weaver*) for The Torrington Company.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Pursuant to Rule 56.1 of the Rules of this Court, plaintiff, Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division ("Allied-Signal"), moves for an order granting judgment on the agency record. Allied-Signal is an importer of bearings manufactured by SNFA Bearings, Ltd. ("SNFA"). This motion challenges the final administrative determination of the Department of Commerce, International Trade Administration ("Com-

merce" or "ITA") for antifriction bearings from France. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Final Results of Antidumping Duty Administrative Reviews* ("Final Results"), 56 Fed. Reg. 31,748 (1991).

BACKGROUND

In May 1989, the ITA published *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France* ("LTFV determination"), 54 Fed. Reg. 19,092 (1989). In this LTFV determination, the ITA assigned antidumping duty margins to French companies that exported antifriction bearings including SNFA.

In May 1990, the ITA published a notice of an opportunity to request administrative reviews of the antidumping orders on antifriction bearings. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 55 Fed. Reg. 19,093 (1990). In June 1990, the ITA initiated reviews of the antidumping duty orders on antifriction bearings from France, including plaintiff's imports. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

The final results of the administrative review at issue were published in July 1991. *Final Results,* 56 Fed. Reg. at 31,748. In the Final Results, the ITA resorted to best information available and selected the highest dumping margins of any company from the LTFV determination. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review* ("Issues Appendix"), 56 Fed. Reg. 31,692, 31,705 (1991). These dumping margins were 66.42% for ball bearings and 18.37% for cylindrical roller bearings. *Final Results,* 56 Fed. Reg. at 31,750. Plaintiff claims that Commerce "punitively" applied as best information available the highest dumping rates from the LTFV determination, rather than rates from the current administrative review. Commerce, however, claims that its decision was reasonable since plaintiff offered no evidence indicating that recent margins were more probative of current market conditions than the other companies' dumping rates from the less than fair value investigation. Oral argument was heard by this Court on September 15, 1992.

DISCUSSION

Pursuant to the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B) (1988 & 1992 Supp.), in reviewing a final ITA determination, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a rea-

sonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

Best Information Available:

It is firmly established that "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the ITA shall] use the best information otherwise available." *See* 19 U.S.C. § 1677e(c) (1992 Supp.);[1] *see also Tehnoimportexport v. United States,* 15 CIT ____, ____, 766 F. Supp. 1169, 1176 (1991); *N.A.R., S.p.A. v. United States,* 14 CIT ____, ____, 741 F. Supp. 936, 941 (1990).

In the case at hand, Commerce resorted to best information available to calculate dumping margins because SNFA provided inadequate responses to Commerce's questionnaire. Plaintiff, Allied-Signal, does not contest Commerce's use of the best information available rule. It does, however, contest Commerce's selection of best information available. Plaintiff argues that in its determination Commerce punitively used the highest margins of other companies' dumping rates from the LTFV determination, rather than rates from the current administrative review.

Defendant, and defendant-intervenors, Federal-Mogul Corporation ("Federal-Mogul") and The Torrington Company ("Torrington"), each claim that Commerce's decision was reasonably within its broad discretion in selecting the best information available. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Administrative Record* at 9–10; *Opposition of Defendant-Intervenor, The Torrington Company, to Plaintiff's Motion for Judgment Upon an Agency Record* at 6–8; *Opposition of Defendant-Intervenor Federal-Mogul Corporation to Plaintiff's Motion for Judgment Upon an Agency Record* at 3–4.

The best information available provision is indeed broadly written and is intended to grant Commerce considerable discretion in determining what constitutes the best information available. *Tai Yang Metal Indus. Co. v. United States,* 13 CIT 345, 349–50, 712 F. Supp. 973, 977 (1989); *Chemical Prods. Corp. v. United States,* 10 CIT 626, 632–33, 645 F. Supp. 289, 294–95 (1986), *remand order vacated,* 10 CIT 819, 651 F. Supp. 1449 (1986). In fact, the information that Commerce ultimately selects as the best information available is "not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information." *Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989), *appeal after remand,* 13 CIT 526, 717 F. Supp. 834 (1989), *aff'd,* 901 F.2d 1089 (Fed. Cir. 1990), *cert. denied sub nom. Floramerica, S.A. v. United States,* 111 S.Ct. 136 (1990).

In *Rhone Poulenc, Inc. v. United States,* 13 CIT 218, 710 F. Supp. 341 (1989), *aff'd,* 899 F.2d 1185 (Fed. Cir. 1990), the court clearly exempli-

[1] Formerly found at 19 U.S.C. § 1677e(b) (1988).

fied the broad discretion afforded to the ITA when it selects best information available. This Court asserted in *Rhone Poulenc,* that "[o]nce Commerce has exercised its discretion to use the best information available rule against a respondent, it is for Commerce, not the respondent, to determine what is the best information." *Id.* at 224, 710 F. Supp. at 346. In *Rhone Poulenc,* the ITA likewise applied as best information available the highest margin (60%) from the LTFV determination rather than the margin from the current administrative review, and this Court deemed that selection reasonable. *Id.* at 225, 710 F. Supp. at 347. The Court of Appeals for the Federal Circuit affirmed this decision because "Rhone Poulenc offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin * * *." *Rhone Poulenc,* 899 F.2d at 1190.

Similarly, the ITA in this case selected the highest prior margins as best information available. Allied-Signal assumed that because the ITA was reviewing several other countries' antifriction bearing sales from the same time period, this information was more representative of current market conditions than the LTFV information. *Plaintiff's Motion for Judgment Upon an Agency Record* at 26–27. Allied-Signal, however, like Rhone Poulenc, offered no evidence to support this assumption.

Furthermore, Commerce explained its reasoning for its selection of best information available at the administrative level. *Issues Appendix,* 56 Fed. Reg. at 31,704–06. The ITA stated that for the purpose of its final results, it applied two tiers of best information available as follows:

> 1. When a company refused to cooperate with the Department or otherwise significantly impeded these proceedings, we have used as BIA the higher of: (1) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less than fair value investigation (LTFV) or (2) the highest rate found in this review for the same class or kind of merchandise in the same country of origin.
>
> 2. When a company substantially cooperated with our requests for information including, in some cases, verification, but failed to provide the information requested in a timely manner or in the form required, we have used as BIA the higher of: (1) The firm's LTFV rate for the subject merchandise (or the "all others" rate from the LTFV investigation, if the firm was not individually investigated), or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Id. at 31,705.

The ITA stated that it applied the first tier of best information available because SNFA "responded to section A (general information) of the questionnaire, but did not respond to sections B, C, or D" and this "lack of information significantly impeded the Department's investigation." *Id.* at 31,706.

Plaintiff claims that this explanation is insufficient and does not justify resorting to the highest rates from the LTFV determination. This Court disagrees. Nevertheless, a court may "uphold [an agency's] deci-

sion of less than ideal clarity if the agency's path may reasonably be discerned." *Ceramica Reaiomontana, S.A. v. United States,* 810 F.2d 1137, 1139 (Fed. Cir. 1987) (quoting *Bowman Transportation v. Arkansas-Best Freight Sys.,* 419 U.S. 281, 286 (1974)).

Furthermore, Commerce's two-tier best information available methodology employed in this case supports the reasonableness of the agency's actions. First, the methodology measured the level of cooperation exhibited by a respondent – a factor which the ITA is expressly allowed to consider in determining what to use as best information available. *See* 19 C.F.R. § 353.37(b) (1992).[2] This permitted the ITA to send a strong message to non-respondents like SNFA that "'failure to cooperate may work against their best interest.'" *Rhone Poulenc,* 899 F.2d at 1191 (quoting *Atlantic Sugar v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984)). Secondly, this methodology enabled the ITA to determine what best information available to use in an expeditious manner, thus allowing the ITA to complete administrative proceedings within tight statutory deadlines. *See, e.g., N.A.R.,* 14 CIT at ___, 741 F. Supp. at 941. Thus, the use of this methodology allowed the ITA to make a reasonable selection of best information available.

Regarding Allied-Signal's claim that Commerce "punitively" applied the best information rule because it selected the highest margin, the Federal Circuit in *Rhone Poulenc* explained the circumstances in which it considered the application of best information available to be punitive. The plaintiff in that case likewise argued that Commerce "sought out the *most punitive* information, rather than the *best* information," when it resorted to the highest prior margin as best information available. *Rhone Poulenc,* 899 F.2d at 1190 (emphasis in original). Although the Federal Circuit declined to explicitly decide whether the ITA may use the best information available rule to "penalize" a party, it explained that best information available is characterized as "punitive" when the ITA rejects low margin information in favor of high margin information that is "demonstrably less probative of current conditions." *Id.*

In this case, as previously mentioned, Allied-Signal did not offer evidence to show that the margins from the LTFV determination were demonstrably less probative of current market conditions than the administrative review margins. Moreover, "the use of the highest prior margin as BIA is not punitive, rather there is a presumption that it 'is the most probative evidence of current margins.'" *Neuweg Fertigung GmbH v. United States,* 16 CIT ___, ___, Slip Op. 92–137 at 12 (August 20, 1992) (quoting *Rhone Poulenc,* 899 F.2d at 1190). Therefore, Commerce's selection of the LTFV rates were not "punitive," but rather were reasonable and in accordance with law.

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[2] 19 C.F.R. § 353.37(b) states that "[i]f an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available."

CONCLUSION

Commerce was justified in resorting to the best information available rule since SNFA failed to complete Commerce's questionnaire. Furthermore, Commerce reasonably applied as best information available the highest of the other companies' dumping rates from the earlier LTFV determination since plaintiff offered no evidence proving that recent margins were more probative. Therefore, Commerce's determination is affirmed in all respects and this case is dismissed.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C92/161 9/9/92 Carman, J.	Defontaine, Inc.	89–5–00293	681.39 5.7%
C92/162 9/9/92 Tsoucalas, J.	Hartog Foods, Int'l, Inc.	92–2–00079	2007.99.65 12.5%

DECISIONS

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
680.49 2.5%	Rollix Bearing, Inc. *v.* U.S., S.O. 91–3 (1991)	Houston, etc. Geared slewing rings
2009.80.60 0.8c per liter	Agreed statement of facts	Newark Peach concentrate

ANNOUNCEMENT

U.S. COURT OF INTERNATIONAL TRADE
New York, NY

Chief Judge Dominick L. DiCarlo has announced the call of the Eighth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Wednesday, October 28, 1992 at The New York Hilton, 1335 Avenue of the Americas (53rd Street), new York, New York and will commence promptly at 9:00 a.m.

The theme of the conference is: "Challenges and Choices—The Changing Face of Customs and International Trade Litigation."

The court has invited the Honorable Carla A. Hills, The United States Trade Representative, to be the Luncheon Speaker.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 350 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past seven Annual Judicial Conferences.

All interested persons are invited to attend. Further information and registration forms may be obtained by contacting Leo M. Gordon, Assistant Clerk, at 212–264–7090.

Dated: September 15, 1992.

JOSEPH E. LOMBARDI,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 26, No. 41, October 7, 1992

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Line Release; new method of processing entries of merchandise; final rule; parts 142 and 178, CR amended	92–93	5
Manifest data; new information dissemination product; final rule; part 103, CR amended	92–92	1

General Notices

	Page
Parallel imports bearing genuine "Yamaha" trademarks, application to restrict; solicitation of comments	19
Trade name, application for recordation: Ashley Furniture Industries, Inc.; solicitation of comments	20

Proposed Rulemakings

	Page
Drawback; appeal to Customs Headquarters of denial of exporter's summary procedure to a drawback claimant; solicitation of comments; part 191, CR amended	23
Electronic transmission of Customs Forms 28 and 29; solicitation of comments; parts 151 and 152, CR amended	26
Exportation following special permit for immediate delivery; solicitation of comments; part 142, CR amended	30
Temporary importation bonds; anticipatory breach, assessment amounts; petition for relief; solicitation of comments; part 10, CR amended	33

U.S. Court of International Trade

Slip Opinion

	Slip Op. No.	Page
Allied-Signal Aerospace Co. *v.* United States	92–157	41

Abstracted Decisions

	Decision No.	Page
Classification	C92/161–C92/162	47

Notice

	Page
Eighth Annual Judicial Conference of U.S. Court of International Trade	48

U.S. G.P.O. 1992–312–749–60008